IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

STEVEN EARL FRASIER, Petitioner, vs. HERB MASCHNER, Respondent.	No. C97-4102MWB **MEMORANDUM OPINION AND ORDER REGARDING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF *HABEAS CORPUS***

I. INTRODUCTION

On August 31, 1986, defendants Steven Frasier ("Frasier"), Simon Tunstall ("Tunstall") and James Simpson ("Simpson") were each charged with murder and burglary stemming from the shooting death of Jeffrey Jones in Sioux City, Iowa. Each defendant pled not guilty and proceeded to a joint trial in the Iowa District Court for Woodbury County. On February 18, 1987, a jury convicted Frasier of first-degree murder and first-degree burglary. On March 30, 1987, the district court denied Frasier's post-trial motions and sentenced him to life imprisonment on the murder conviction and a term of imprisonment not to exceed twenty-five years on the burglary conviction, with the sentences to be served concurrently.

On September 15, 1997, Frasier filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. The petition was originally filed in the Southern District of Iowa, but was later transferred to the Northern District of Iowa on November 17, 1997. On May 11, 1999, the undersigned referred this matter to United States Magistrate Judge Paul A. Zoss for the filing of a report and recommended disposition of the petition pursuant to 28 U.S.C. § 636(b)(1)(B). On March 27, 2001, Judge Zoss filed a Report and Recommendation,

finding that Frasier only preserved one issue for the court's review and, further, that with respect to that single issue, Frasier failed to demonstrate that his counsel was ineffective. Consequently, Judge Zoss recommended that judgment be entered in favor of respondent and against Frasier. Frasier has filed objections to the Report and Recommendation.

Before turning to Frasier's objections, the court notes that several of the claims asserted by Frasier in his petition for writ of *habeas corpus* are duplicative of the claims Simon Curtis Tunstall ("Tunstall"), his co-defendant during the state trial, asserted in his petition for writ of *habeas corpus*. In light of these common claims, the court characterizes Frasier's case and Tunstall's case as companion cases—that is, many of the claims asserted in Frasier's and Tunstall's respective petitions for writ of *habeas corpus* are analogous and require the same analysis. Because this court has previously reviewed and analyzed the claims that Tunstall asserted in his petition for writ of *habeas corpus* in two reported decisions, *see Tunstall v. Hopkins*, 126 F. Supp. 2d 1196 (N.D. Iowa 2000) ("*Tunstall I*") and *Tunstall v. Hopkins*, ___ F.Supp.2d ___, 2001 WL 720636 (N.D. Iowa June 21, 2001) ("*Tunstall II*"), the court finds that a reiteration of that analysis here, regarding the identical claims that Frasier raises in his petition for writ of *habeas corpus*, would be redundant, and, thus, unnecessary. Consequently, in analyzing two of Frasier's objections to the Report and Recommendation, the court will refer periodically to portions of the reported decisions in *Tunstall* that are cited above and which contain analysis that applies with equal force to Frasier's claims here.

II. LEGAL ANALYSIS

A. Standard Of Review

The standard of review to be applied by the district court to a Report and Recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of

> those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). However, the plain language of the statute governing review provides only for *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Because objections have been filed in this case, the court must conduct a *de novo* review of those portions of the Report and Recommendation to which Frasier objects.

B. The Requirements of § 2254(d)(1)

Section 2254(d)(1) of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was *contrary to*, or involved *an unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254(d)(1) (emphasis added). As the United States Supreme Court explained

in *Williams v. Taylor*, 529 U.S. 362 (2000), "for [a petitioner] to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1)." *Williams*, 529 U.S. at 403.

In *Williams*, the Supreme Court addressed the question of precisely what the "condition set by § 2254(d)(1)" requires. *See id.* at 374-391 (Part II of the minority decision); *id.* at 402-414 (Part II of the majority decision).[1] In the portion of the majority decision on this point, the majority summarized its conclusions as follows:

> [Section] 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. *Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied*—the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." *Under the "contrary to" clause*, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. *Under the "unreasonable application" clause*, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 432-424 (emphasis added); *see also Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir.

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[1] In *Williams*, the opinion of Justice Stevens obtained a 6-3 majority, except as to Part II, which is the pertinent part of the decision here. *See Williams*, 529 U.S. at 367. Justice O'Connor delivered the opinion of the Court as to Part II, in which she was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia, thereby obtaining a 5-4 majority on this portion of the decision. *See id.*

2000) ("It seems to us that § 2254(d) as amended by the AEDPA is unambiguous as to the scope of federal court review, limiting such review (at least as compared with past practice) in order to effect the intent of Congress to expedite habeas proceedings with appropriate deference to state court determinations. *See Williams v. Taylor*, 529 U.S. 362, ___, 120 S. Ct. 1495, 1518, 146 L. Ed. 2d 389 (2000) (noting purposes of AEDPA amendments).").

The Court also clarified two other important definitions. First, the Court concluded that "unreasonable application" of federal law under § 2254(d)(1) cannot be defined in terms of unanimity of "reasonable jurists"; instead, "the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 410. Consequently, "[u]nder § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be [objectively] unreasonable." *Id.* Second, the Court clarified that "clearly established Federal law, as determined by the Supreme Court of the United States" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision," and "the source of clearly established law [is restricted] to this Court's jurisprudence." *Id.* at 412.

C. Frasier's Objections to the Report and Recommendation

Frasier has filed objections to both the factual background and legal conclusions reached by Judge Zoss in the March 27, 2001, Report and Recommendation. The first objection asserted by Frasier pertains to Judge Zoss's presentation of the factual background in the Report and Recommendation, specifically that the Report and Recommendation contains insufficient facts about the case. The second objection asserted by Frasier concerns Judge Zoss's improper characterization of the charges brought against Frasier and

his conviction. The third objection asserted by Frasier concerns Judge Zoss's finding that the evidence at trial was "overwhelmingly against" Frasier. After conducting a *de novo* review of these portions of the Report and Recommendation to which objections were made, the court finds the objections to be without merit and they are therefore overruled. Notwithstanding, even if the court sustained these three objections, the ultimate disposition of Frasier's petition for *habeas corpus* would remain the same.

The fourth objection asserted by Frasier to the Report and Recommendation pertains to Judge Zoss's finding that Frasier's claim that the trial court erred in allowing the State to question co-defendant Simpson using Simpson's pretrial statement, which had been suppressed, is procedurally defaulted. The fifth objection asserted by Frasier to the Report and Recommendation relates to Judge Zoss's finding that Frasier's claim that his right to confrontation was violated[2] is also procedurally defaulted. Upon a *de novo* review, the court concludes that both of these claims are, indeed, procedurally defaulted and not properly before the court. Thus, this court adopts Judge Zoss's findings with respect to these claims in the Report and Recommendation, and overrules Frasier's objections. The sixth objection asserted by Frasier to the Report and Recommendation relates to Judge Zoss's finding that Frasier failed to demonstrate that his counsel was ineffective in failing to request *voir dire* of the jury to determine whether any juror had seen a newspaper article discussing the case. Upon a *de novo* review, the court concludes that Frasier has failed to show that his counsel was ineffective, and in reaching this conclusion, the court relies on its prior analysis of the identical claim set forth by Tunstall in his petition for *habeas*

[2]Frasier contends that his right to confrontation was violated by the following: (1) the trial court's restriction on the defendant's cross-examination of Christine Buddi; (2) the State's failure to notify the defense that Buddi would answer questions at trial when she had previously refused to do so, invoking her privilege against self-incrimination; and (3) the trial court's admission of hearsay testimony.

corpus. *See Tunstall v. Hopkins*, ___ F.Supp.2d ___, 2001 WL 720636, *4-15.

The seventh objection asserted by Frasier to the Report and Recommendation concerns Judge Zoss's failure to consider Frasier's claim that his right to due process was violated by the trial court's failure to *voir dire* the jurors regarding the newspaper article after it was brought to the court's attention. To the extent that Judge Zoss failed to consider this claim in the Report and Recommendation, the court sustains Frasier's objection. As a result, this court must consider this claim *de novo.* After doing so, the court concludes that it is procedurally defaulted. Indeed, Frasier even concedes as much, stating "[a]dmittedly, the issue has never been raised at any time during the state appeal process." *See* Petitioner's Reply Brief at 9 (Doc. #47). Consequently, Frasier's claim that his right to due process was violated by the trial court's failure to *voir dire* the jurors regarding the newspaper article after it was brought to the court's attention, is not properly before the court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842-43 (1999) ("Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."); *see also Frey v. Schuetzle*, 151 F.3d 893, 897 (8th Cir. 1998). Assuming *arguendo* that this claim was not procedurally defaulted, the court would nonetheless deny Frasier's petition for writ of *habeas corpus* based on this claim because, as this court concluded in the companion case of Tunstall, there is no clearly established federal law, as determined by the Supreme Court, that governs this claim for *habeas corpus* relief. *See Tunstall v. Hopkins*, 126 F.Supp.2d 1196 (N.D. Iowa 2000).

D. Certificate of Appealability

In *Tunstall II*, this court concluded that Tunstall had succeeded in making a substantial showing of the denial of a constitutional right in order to be granted a certificate

of appealability concerning three issues, two of which Frasier raised in his petition for writ of *habeas corpus*—namely, (1) whether the trial court erred in failing to *voir dire* the jury; and (2) whether Frasier's trial attorney was ineffective in failing to request *voir dire* of the jury. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998). The court finds that Frasier, as did Tunstall, has made a substantial showing of the denial of a constitutional right with respect to these two issues. Consequently, the court **grants a certificate of appealability** with respect to these two issues, namely: (1) whether the trial court erred in failing to *voir dire* the jury; and (2) whether Frasier's trial attorney was ineffective in failing to request *voir dire* of the jury.

III. CONCLUSION

Therefore, with the exception of Frasier's objection to Judge Zoss's failure to consider his claim regarding the trial court's failure to *voir dire* the jury panel regarding the newspaper article, which the court **sustains**, the court **overrules** all of Frasier's objections to the March 27, 2001, Report and Recommendation. Indeed, having reviewed the record and Judge Zoss's findings of fact and conclusions of law as they relate to Frasier's claims, save the one claim upon which I sustained Frasier's objection to the Report and Recommendation, I find no error and **accept** the Report and Recommendation as to these claims. The sustaining of the one objection to the Report and Recommendation, as demonstrated above, has no impact on the ultimate disposition of that claim or on Frasier's petition for writ of *habeas corpus*. **Therefore, the court concludes that judgment be entered in favor of respondent and against Frasier**. The court further concludes that a certificate of appealability shall be **granted** with respect to Frasier's following two claims:

(1) whether the trial court erred in failing to *voir dire* the jury; and (2) whether Frasier's trial attorney was ineffective in failing to request *voir dire* of the jury.

IT IS SO ORDERED.

DATED this 26th day of July, 2001.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA